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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1971

No. 71-1196

RALPH E. COREY and ROBERT M. KIMBROUGH, Petitioners

v.

STATE SAVINGS & LOAN ASSOCIATION, WALLACE C. S. YOUNG, and BETTER BUILT HAWAII, LTD., Respondents.

BRIEF IN OPPOSITION TO GRANTING OF PETITION FOR CERTIORARI

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CITATIONS

Cases:

Central Land Company v. Laidley, 159 U.S. 103, 40 L.Ed. 91, 16 S.Ct. 80 (1895)

Ellis v. Crockett, 51 Haw. 45 (1969)

Loeber v. Schroeder, 149 U.S. 580, 37 L.Ed. 856, 13 S.Ct. 934 (1893)

McCorquodale v. Texas, 211 U.S. 432, 53 L.Ed. 269, 29 S. Ct. 146 (1908)

Morton v. Dardanelle Special School District, 121 F.2d 423 (8th Cir. 1941), cert. den. 314 U.S. 655, 86 L.Ed. 525, 62 S.Ct. 106, reh. den. 314 U.S. 711, 713, 86 L.Ed 567, 568, 62 S.Ct. 178, 358

Pim v. St. Louis, 165 U.S. 273, 41 L.Ed. 714, 17 S.Ct. 322 (1897)

Tracy v. Ginzberg, 205 U.S. 170, 51 L.Ed. 755, 27 S.Ct. 461 (1907)

Wood v. Conneaut Lake Park, 386 F.2d 121 (3rd Cir. 1967), cert. den. 391 U.S. 907, 20 L.Ed.2d 422, 88 S.Ct. 1660

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C. S. YOUNG, and
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LTD.,
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No. 71-.....

CITATIONS TO OPINIONS BELOW

The Opinion of the Hawaii Supreme Court is reported at 53 Haw. 132. That court's per curiunr denial of the petition for rehearing is reported at 53 Haw. 177.

JURISDICTION

The jurisdiction of this Court is invoked by petitioners under Title 28, §1257(3), United States Code, with respect to title, rights, privileges, and immunities set up and claimed under the Constitution of the United States.

Respondents question this jurisdiction in that no federal question had been raised by petitioners until their petition to the Hawaii Supreme Court for a rehearing and that court has not decided any federal question.

QUESTIONS PRESENTED

The Petition for Certiorari states that the decision below presents three questions for review. Respondents feel that the following questions are presented:

I

Does the judgment of a State court of last resort violate the Fourteenth Amendment to the Constitution of the United States where it reverses a trial court and reinstates a jury verdict based on conflicting evidence where there is substantial evidence to support the jury's finding?

II

Is the Fourteenth Amendment to the Constitution of the United States violated by the mere fact that a person is unsuccessful in a matter involving property where there has been a full hearing, or opportunity for hearing, and where that person has been fully heard in the regular course of judicial proceedings?

III

Should the Supreme Court of the United States issue a writ of certiorari to review the judgment of the Supreme Court of Hawaii, when that State court did not decide a Federal question, and none was necessary for the determination of the case?

IV

Was the Fourteenth Amendment to the Constitution of the United States violated when the Supreme Court of Hawaii, by way of dicta, exercised its inherent duty to support the ethical standards of the Bar when it attempted to impress upon one of its members his duty to keep his conduct beyond reproach?

STATEMENT OF THE CASE

PART I

On November 15, 1963, Petitioners Kimbrough and Corey went to the offices of Respondant, State Savings & Loan Association, in an effort to secure a construction mortgage loan commitment for the Kauaian Development Co., Inc. (hereinafter called "Development Company."), to erect a hotel condominium complex to be known as the Hyatt House on the island of Kauai. Mr. Kimbrough and Mr. Corey were each 25% shareholders and the President and Vice President-General Counsel, respectively, of the Development Company. Messrs. Kimbrough and Corey informed Mr. Brown, a Vice President of State Savings, that they were anxious to secure a loan commitment before the end of the year. Mr. Brown informed the gentlemen that he lacked authority to make a loan of the magnitude requested and that such a commitment would have to be approved by the Board of Directors of State Savings (a Utah corporation) in Salt Lake City. He informed them that; before the Board of Directors would pass on the application, they would need all of the relevant data relating to the cost of land, cost of construction, financial information, etc., showing the stability of the Development Company, as well as all other pertinent information regarding the feasibility of the project. Many conferences followed in which extensive documentation was furnished Mr. Brown by Messrs. Kimbrough and Corey regarding many phases of the project, and these were forwarded to Salt Lake City.

On or about December 9, 1963, Mr. Corey submitted to Mr. Brown a financial statement of the Development Company which Mr. Corey had personally signed as Vice President, revealing that the construction cost was $761,500.00, and in addition thereto there were other items

of construction to be paid for by the Development Company.

By December 20, 1963, no appraisal had been made of the project to be constructed and in a letter to the Board of Directors of State Savings Mr. Brown wrote:

> "The amount of the loan is left indefinite since it is based on 65% of an appraisal which we hope to get in about ten days . . ."

Mr. Brown testified that he had hoped for approval of the loan and on December 23rd had prepared a loan commitment, which he held pending the anticipated approval of his Board of Directors. The proposed commitment which he then prepared reads in part:

> "We will make a mortgage for the construction and development of this project in an amount not to exceed sixty-five per cent (65%) of the fair appraised value of the real property, including the land, seventy-seven (77) apartments and other facilities. This fair appraised value will be based on an appraisal to be made by an M.A.I. appraiser approved by us."

On December 24th, Mr. Brown received a telegram from his Board of Directors approving the loan on the terms and conditions set forth in the telegram, which terms and conditions differed materially from the letter he had prepared and had anticipated sending. Insofar as the telegram is pertinent, it provides as follows:

> "BOARD STILL PREFERS 50% PORTION OF LOAN TO KAUAIAN HYATT HOUSE BUT APPROVED 100% ON FOLLOWING TERMS AND CONDITIONS *LOAN NOT TO EXCEED 65% OF M.A.I. APPRAISAL OR 65% OF M.A.I. APPRAISAL OF LAND PLUS CONSTRUCTION AND RELATED COSTS WHICHEVER IS LESS* STOP . . ." (emphasis added)

Messrs. Corey and Kimbrough came to the office of State Savings on Christmas Eve after it had closed for the day and, rather than retype the commitment letter, Mr. Brown relates that Mr. Corey suggested to him that the letter be amended in ink to conform to the conditions of the telegram and that the telegram be attached to the letter and made a part thereof. Accordingly, Mr. Corey amended the letter with an ink pen and executed the letter with the following notations, which were also initialed by Mr. Corey:

> "Subject to conditions in attached cable.
> Accepted December 24, 1963, Kauaian
> Development Co., Inc. by Ralph E. Corey,
> Its Vice President."

Sometime between December 24, 1963 and January 15, 1964, Mr. Brown testified that he received from Mr. Corey or Mr. Kimbrough a construction cost breakdown, which was on the typed heading of the contractor, Better Built Hawaii, Ltd., hereinafter referred to as "Better Built". This construction cost breakdown contained an itemized breakdown of 36 construction items. Thirty-one of these items are in a column designated "Contractor's Cost" and total $761,500.00. The remaining five construction items, including the balance due on the architect's contract, total $211,855.00 and are listed in a column designated "Developers' Cost". The total cost of construction as revealed by the contractor's cost breakdown is $973,355, which is the aggregate of the columns entitled "Subcontractors and Materials: Contractor's Cost and Developers' Cost".

At approximately the same time that Mr. Brown received the contractor's cost breakdown from Mr. Corey or Mr. Kimbrough, he also received from the developers a Performance Bond issued by the contractor, Better

Built, as principal, and First Insurance Company of Hawaii, Ltd., as surety. The bond runs in favor of the developers and is in the amount of $761,500.00. It covers a construction contract between the contractor and the developers dated October 28, 1963, for the Kauaian Hyatt House for the amount of $761,500.00. A Payment Bond for 50% of the construction contract ($380,750.00) with the same principal and surety in favor of the developers was also delivered to Mr. Brown by the developers.

At approximately the same time, the developers delivered to Mr. Brown minutes of a special meeting of the Board of Directors of the Kauaian Development Company held on January 6, 1964, which minutes reveal Messrs. Kimbrough and Corey to be present. The minutes insofar as they are pertinent read as follows:

> "The following resolutions were unanimously adopted:
>
> "(1) RESOLVED, that KAUAIAN DEVELOPMENT COMPANY, INC. accept the loan offer and commitment for the financing of the KAUAIAN HYATT HOUSE at Poipu Beach on the Island of Kauai, made by STATE SAVINGS & LOAN ASSOCIATION of Honolulu by letter and attached cable on December 23, 1963, in accordance with the expressed terms of said letter commitment *with attached cable.*" (emphasis added)

As the parties moved toward the closing of the construction loan, Mr. Brown wrote to Mr. Kimbrough on January 15, 1964 as follows:

> "We are in the process of preparing the mortgage documents for a loan in the amount of $857,000.00 for the construction of your Kauaian Hyatt House development. These papers should be ready for signature on January 20.

"It might be appropriate at this time to spell out specifically what documents we must have for our files in order to complete this mortgage agreement and to record the papers. We need, for our files, a copy of the complete plans and specifications for the construction. We also need a copy of the contract between you and the builder. If the contract does not specifically spell out the arrangements under which the payments are to be made we would like a separate letter of agreement instructing us as to how these payments are to be made and under what kind of authorization. We should also have a copy of all of the other related contracts for the sewage disposal plant, the rock wall and grading work, the landscaping, the architect's agreement, the appliances and the carpeting, if these are on separate contracts. All of these documents are needed in order to justify the loan of $857,000.00 in accordance with the original commitment by our Board. If payments have been made on some of these obligations then evidence of such payment should be in our files. *The Loan Settlement Statement is going to have to indicate where and how the money is to be provided for meeting all of these obligations for the ultimate completion of all of the project which is subject to our mortgage.*" (emphasis added)

Mr. Brown testified that he arrived at the amount of the loan by following the terms of the loan commitment as fully set forth in the telegram. He had received the appraisal of January 13, 1964 at about this time. The figures in the appraisal for site preparation and the sewage treatment plant were identical or virtually identical to the figures for these items contained in the construction cost breakdown, which he had reviewed, and the architect's fee and other items substantiated the construc-

tion cost breakdown which had been delivered to him by Mr. Corey. Mr. Brown testified that he had verified the construction cost breakdown with the figures set forth in the appraisal.

The total cost of construction as revealed in the contractor's cost estimate, which was furnished to Mr. Brown by Mr. Corey, is $973,355.00. By following the terms of the loan commitment as set forth in the telegram,[1] the mortgage loan figure of $857,000.00 is arrived at as follows:

Appraised value of land		$ 345,000.00
Cost of construction per Contractor's Cost breakdown		
(a) Contractor's Cost	$761,500.00	
(b) Developers' Cost	211,855.00	973,355.00
		$1,318,355.00

65% of $1,318,355 is $856,930.75, which is rounded off to $857,000.00.

On or about the same time, Mr. Brown testified that he asked Messrs. Kimbrough and Corey for an executed copy of the construction contract. The contract which was delivered is between the Development Company, as owner, and Better Built, as contractor, in the amount of $761,500.00 and dated October 28, 1963. Mr. Corey had on more than one occasion represented to Mr. Brown that the construction contract was $761,500.00. Mr. Kimbrough also made these representations to Mr. Brown. Mr. Brown relied on the construction contract of $761,500.00.

[1] ". . . LOAN NOT TO EXCEED 65% of M.A.I. APPRAISAL OR 65% OF M.A.I. APPRAISAL OF LAND PLUS CONSTRUCTION AND RELATED COSTS WHICHEVER IS LESS STOP" (Exhibit 6)

Mr. Brown also testified that about this time he received a letter which is dated January 16, 1964 from Mr. Kimbrough and which reads as follows:

> "With reference to your letter of January 15, 1964, requesting specifically how the escrow be paid to the contractor, Better Built Hawaii, Ltd., and to Kauaian Development Co., Inc., the following applies:
>
> "The contractor, Better Built Hawaii, Ltd., will prepare a request for specific amounts of withdrawals monthly to Kauaian Development Co., Inc. Kauaian Development Co., Inc. will, at that time, review the amount of construction completed or the amount of materials purchased, and, if satisfactory, approve the request and hand carry the same to State Savings and Loan Association. The authorized signature for approval by Kauaian Development Co., Inc. will be that of Robert M. Kimbrough, President.
>
> "All checks issued by State Savings and Loan Association out of their escrow shall be made payable to Kauaian Development Co., Inc."

Mr. Brown testified that, in reliance on all of the foregoing documents and the verbal representations of Messrs. Kimbrough and Corey, he prepared a Loan Settlement. The statement revealed that the loan proceeds available for disbursement from the loan of $857,000.00 after the deduction of applicable loan expenses and charges would be $821,189.50. The developers had informed Mr. Brown that construction had already started and that several thousand dollars had already been paid to the contractor. The Loan Settlement Statement revealed a loan balance of $813,925.00 while the cost of the work yet to be performed was $867,675.00. Thus, the total anticipated cost of construction exceeded the loan proceeds, leaving a cash deficiency of $46,485.00.

Mr. Brown testified he had informed Messrs. Kimbrough, Corey and Young that, if there were a cash deficiency, they would have to deposit with the Association in cash such deficiency as existed in order to assure that sufficient funds would be available to pay the expenses of construction. The developers had assured Mr. Brown that they were good for the money and that they would guarantee the payment of the shortage to assure completion of the project. In fact, in Mr. Corey's presence, they represented to Mr. Brown that Mr. Corey alone was worth $300,000.00. Mr. Brown knew that Mr. Young, the Secretary-Treasurer of Kauaian Development, had several businesses around town and was under the impression that he had a rather substantial net worth.

In reliance upon these statements and the representations of Messrs. Kimbrough, Corey and Young, Mr. Brown prepared as one of the closing documents a written undertaking for these gentlemen to execute which reads in its entirety as follows:

"January 17, 1964

"State Savings and Loan Association
1001 Bishop Street
Honolulu, Hawaii 96813

"Gentlemen:

"This letter will confirm our oral agreement regarding the mortgage funds and the construction funds for the Kauaian Hyatt House.

"The construction mortgage loan in the amount of $857,000.00 was dated January 17, 1964 and signed on this date on behalf of the Kauaian Development Company, Inc. as the mortgagor and State Savings and Loan as the mortgagee. On the Loan Settlement Statement, in connection with this loan, there are listed the expenditures to be made by the loan com-

pany in order to complete the project. This statement shows an additional amount to be received from the development company to provide for all loan disbursements in the amount of $46,485.50. Although the mortgage loan is made to the corporation, of which the undersigned are officers, it is hereby agreed that the undersigned officers pledge their personal liability for the above amount of money, or any other amount of money that may be necessary, to complete the proposed Hyatt House development on the island of Kauai. We guarantee that this money will be available for the payment of expenses to complete this project as originally proposed in the mortgaging agreements.

"Very truly yours,
/s/Robert M. Kimbrough, Pres.
/s/Wallace C. S. Young
/s/Ralph E. Corey

The written undertaking was reviewed and executed by the principals without comment and was one of the documents which Mr. Brown relied on when he made the loan.

The loan was closed on January 17, 1964, and the mortgage for $857,000.00 was placed of record on that day. The loan proceeds were then available for disbursement. In processing the loan, the progress payments were made to Kauaian Development Company pursuant to the developers' request of January 16, 1964. By letter to the contractor, Better Built Hawaii, Ltd., dated March 17, 1964, Mr. Brown sought clarification that the contractor was being paid. Emil Offer, the President of Better Built, telephoned Mr. Brown and satisfied him that the contractor was being paid.

A letter was written on the same date to the architect

to assure that he was being paid his fee of $40,000.00 as originally represented by Mr. Corey. By letters dated March 31, 1964 and April 7, 1964, this fee was confirmed and explained, showing the fee to be $37,500.00 (5% of $750,000.00 payable 80% upon completion of the construction contract negotiations, plus $2,500.00 for some plan revisions).

Each of the various requests for progress payments was executed by Emil A. Offer, President of Better Built, and Robert M. Kimbrough on behalf of the Development Company, and all loan disbursements were made pursuant to these payment requests. The ninth payment request dated August 25, 1964 against the construction contract was for $30,000.00 and it was noted to be the balance due to the contractor. This request was executed by both Mr. Kimbrough and Mr. Offer. All of the progress payments had been issued by check to the developers and the final payment of the loan proceeds then remaining, which amounted to $17,599.50, was paid directly to the Development Company on certificate of Mr. Kimbrough and Mr. Young on September 14, 1964.

PART II

A. Facts Surrounding the Conspiracy Agreement.

On or before October 28, 1963, more than two weeks before State Savings was approached, the contractor prepared an actual cost breakdown estimate, including profit and overhead necessary to construct the work set forth in the plans and specifications for the project as submitted to it by the developers. The total estimated cost was $701,500.00. Emil Offer, the President of the contracting company, testified that on October 28, 1963, Better Built entered into a construction contract with the developers to perform all such work for $701,500.00. Mr.

Offer testified that, thereafter, he secured a performance and payment bond to bond this construction contract.

Thereafter, the contractor was able to effect some savings, thereby reducing the contract price, and also agreed to take his anticipated profit of $60,000.00 in apartments. On November 8, 1963, the construction contract of October 28, 1963 was, therefor, cancelled and the parties entered into a new construction contract whereby Better Built was to do ". . . all contractual work . . ." for $600,000.00 in cash, plus $60,000.00 worth of apartments in the project when the project was completed. This contract shall sometimes be referred to herein as the "$600,000.00 contract". Mr. Offer testified that included in this contract was the sewage treatment plant, landscaping, fill, etc., which are the same items that are listed separately as Developers' Costs in the documents submitted in support of the loan application. On November 8, 1963, Mr. Offer executed this new contract for the contractor, and Mr. Kimbrough executed it for the developers. Mr. Corey read this contract when it was signed.

Seven days later, Mr. Kimbrough and Mr. Corey went to the offices of State Savings for the first time to apply for a mortgage loan. One of the first documents furnished to State Savings was a financial statement dated December 9, 1963 and signed by Ralph E. Corey, Vice President, which reads in part:

"Construction (completely bonded) $761,500;
Site Improvement (rock walls,
fill, pier landscaping, grading,
signs and out-door lights) ..... $ 60,000"

Mr. Offer testified that sometime in December of 1963, at the request of Mr. Kimbrough and Mr. Corey, and in their presence in Mr. Corey's law office he effected a construction contract for $761,500.00. The con-

tract is dated October 28, 1963, and the manner in which the contract was effected was by taking the old October 28, 1963 contract for $701,500.00, and changing page 2 by withdrawing the old page 2, which had a contract figure of $701,500.00, and inserting in lieu thereof a new page 2, in all respects identical except that the contract amount is $761,500.00. The new page 2 was initialed by Mr. Offer and Mr. Kimbrough. Mr. Offer testified that this new contract had no purpose other than financing purposes. Mr. Offer testified that, at the request of Mr. Kimbrough and Mr. Corey, he made application to the First Insurance Company of Hawaii, Ltd. to reissure the performance and payment bonds in the amount of $761,500.00, and the new bonds reflecting the contract price of $761,500.00 were reissued to replace the old bonds with a contract price of $701,500.00. Mr. Offer testified that he delivered the bonds to the developers and they used them for their purposes. These were the particular bonds that were delivered to Mr. Brown at State Savings. The penal amount of the performance bond delivered to State Savings is $761,500.00, the amount reflected in Mr. Corey's financial statement of December 9, 1963.

Neither Mr. Kimbrough nor Mr. Corey or Mr. Young ever told Mr. Brown of the $600,000.00 construction contract, and had he known the real construction contract was other than the one represented to be $761,500.00, he would not have made the loan.

Nothing else happened until December 24th when the loan commitment with attached cable was issued by State Savings and accepted by Mr. Corey for the developers.

On or about December 31, 1963, Mr. Offer went to Mr. Corey's law offices where Mr. Kimbrough handed to him a letter agreement for execution by him.

The letter agreement, which shall hereinafter be referred to as the "conspiracy agreement", reads in its entirety as follows:

"Honolulu, Hawaii
December 31, 1963

"Better-Built Hawaii, Ltd.
P. O. Box 3527
Honolulu, Hawaii

"*In re:* Contractor's Cost Breakdown Estimate
"*Attention* Mr. Emil A. Offer, President

"Dear Mr. Offer:

"Enclosed herewith is a copy of your corporation's Contractor's Cost Breakdown Estimate.

"It is the mutual understanding and agreement of Better-Built Hawaii, Ltd. and Kauaian Development Company, Inc. that the attached Estimate is made and given by your corporation for financing purposes only, and is not to be interpreted or construed by either party to modify in any way the sole and existing written agreement between them dated November 8, 1963, relating to the total cost and price figure of $600,000 for all contractual work to be performed by your corporation, including rock wall and fill and pier facilities, as well as to other matters.

"It is further understood and agreed by both corporations that the preparation of the Cost Breakdown Estimate attached hereto is necessitated by reason of the new 65% financing and loan commitment obtained by Kauaian Development Company, Inc. from State Savings & Loan Association of Honolulu, said commitment to be based upon an immediate and new appraisal of the entire proposed development by Mr. John Hulten, M.A.I. appraiser.

"It is understood that all withdrawals of funds by

the Contractor from time to time from the loan escrow in accordance with the Estimate attached and the Schedule of Withdrawal to be provided by the lender will be cooperatively and mutually shared and disbursed by and between our two corporations in accordance with the total contractor's cost figure contained in the November 8, 1963 agreement and in direct proportion to moneys and equity due each corporation in the venture.

"BETTER BUILT HAWAII, LTD.,
By/s/ Emil A. Offer
EMIL A. OFFER
Its President

KAUAIAN DEVELOPMENT
COMPANY, INC.,
By/s/ Robert M. Kimbrough
ROBERT M. KIMBROUGH
Its President"

(The underlined portions appear in the original letter.)

At the time that the conspiracy agreement was handed to Mr. Offer in Mr. Corey's offices, Mr. Offer testified that he was handed a contractor's cost estimate. There is typed on the top of this document in capital letters the notation *"NOTE: TO BE USED FOR FINANCING PURPOSES ONLY."* This cost breakdown designates as contractor's cost a total amount of $761,500.00 and in addition lists as developers' cost a total of $211,855.00.

Mr. Offer testified that he had never been involved in a large construction contract before and that he knew that Mr. Corey was an attorney and that Mr. Kimbrough was a financial advisor on construction projects in California, and further testified that in Mr. Kimbrough's presence in the same meeting, Mr. Kimbrough indicated

to him that this type of operation was customary. In fact, ". . . He said it was done all the time". Both Mr. Kimbrough and Mr. Corey testified that they had no duty to the lending institution to reveal the true facts for the matter was private and one between the contractor and developer.

B. Facts Surrounding the Written Understanding.

By January 15, 1964, all of the necessary documents to support the loan had as yet not been delivered to State Savings. By letter that day, Mr. Brown requested these documents. In anticipation of preparing the loan settlement statement, the letter reads: ". . . the loan settlement statement is going to have to indicate where and how the money is to be provided *for meeting all of these obligations for the ultimate completion for all of the project which is the subject to our mortgage.*" (emphasis added)

The documents requested began to come in, including the developers' appraisal. Mr. Brown used various figures in the appraisal to substantiate and verify the contractor's cost breakdown. The financial statement and balance sheet, both of which Mr. Brown relied on in making the loan, had already been delivered. The construction contract for $761,500, together with the performance and payment bonds for this contract, were also delivered to Mr. Brown about this time and he testified that he relied upon them in making the loan. Mr. Brown prepared the loan settlement statement from the information contained in the contractor's cost estimate, and that settlement statement revealed a cash deficiency of $46,485.50. Mr. Brown asked the developers to put the difference up in cash, but Mr. Kimbrough had told him there would be no problem, for Mr. Corey alone was worth $300,000. They indicated that they would prefer

to sign a written undertaking to assure that the money would be available when needed and Mr. Brown prepared such a written undertaking and they signed it. Mr. Brown testified that he relied upon this written undertaking at the time that he made the loan and that it was an essential part of the loan documentation.

C. Disbursement of Loan Proceeds and the Amended Construction Contract.

On January 17, 1964, Mr. Brown closed the mortgage and started disbursing the loan proceeds to the developers. What Mr. Brown did not know are the facts which Mr. Offer testified to five and a half years later. Mr. Offer testified that he prepared the statement for each progress payment and gave it to Mr. Kimbrough, from which they prepared the final one to be submitted to the lender, and then they both signed it and submitted it to State Savings. The money from State Savings was then divided pursuant to the terms of the conspiracy contract. Mr. Offer further testified that when he got Mr. Brown's letter of March 17 making inquiries as to whether or not he was getting paid the amounts requested, that he did in fact telephone Mr. Brown and told him that he was getting paid as requested. Mr. Offer testified that the only consideration Better Built was given for all of the work it did on the Seven Seas Hotel was $600,000 in cash and a deed to three condominium units, which were already subject to a master mortgage in favor of State Savings.

D. Foreclosure of the Mortgage.

The mortgage loan became delinquent and on July 16, 1965, Civil No. 636, *State Savings & Loan Association v. Kauaian Development Company, Inc., et al.*, was docketed in the Fifth Circuit Court of the State of Hawaii. The complaint was amended on October 12, 1965,

after Better Built Hawaii, Ltd. and other mechanics' lien claimants had joined in the action.

The mortgage foreclosure was a suit in equity brought *in rem* to foreclose the master mortgage upon the property. Although Messrs. Kimbrough, Corey and Young did not appear as title holders to any units, they were, nevertheless, cited as defendants because of their letter of February 27, 1965 to the condominium unit owners wherein they alleged that they were apartment owners. The letter reads in part as follows:

> ". . . We have done everything possible to guide this venture into safe waters. We belive we have at last done so. We can do no more. *We are now apartment unit owners on the same basis as everyone else.*" (emphasis added)

Shortly after the mortgage foreclosure suit was instituted, the Kauaian Development Company filed a Chapter X proceeding for reorganization in the Federal District Court for the District of Hawaii. This followed other civil litigation commenced between various parties to determine the real owners of the stock of the Kauaian Development Company, Inc., and the Kauaian Land Company, Inc. These proceedings continued through the Fall of 1965, at which time the persons then in possession of the hotel physically abandoned the hotel after allowing its fire insurance to lapse. Because the hotel was left without a living soul to maintain or protect it, plaintiff on December 3, 1965 petitioned for a receiver and the receiver took over custody of the property on that day. Trial was held on the mortgage foreclosure and thereafter the mechanic's lien claimants presented their respective cases.

The Court ordered that the property be foreclosed and sold to pay the balance due on the mortgage and

two mechanics' liens totaling $28,506.70, which had priority over the mortgage. The receiver was ordered to sell the property at public auction at an upset price in an amount of approximately the amount of the mechanic's liens and the mortgage balance, including the expenses of foreclosure, the receiver's salary and the commissioner's and attorneys' fees. There were no bidders at the first judicial auction and the Judge after proper hearing ordered that the property be sold without an upset price. At the second judicial auction on August 30, 1966, State Savings appeared and bid the total amount of $913,000 for the property, which was $138,200.80 less than the balance due on the mortgage. After the second auction, there was a hearing on a motion by the commissioner to ratify and confirm the report of the commissioner and to approve the sale. The Order confirming sale was entered by the Court on September 28, 1966. The Order recites, ". . . it appeared to the Court that the sale was in all respects regularly and fairly advertised, made and conducted . . ." The Court noted that the balance of the mortgage (being the principal, interest, loan expenses, receiver's salary, commissioner's fee, advertising expenses of $1,219.92 to advertise the two foreclosure sales and mechanics' liens totaling $28,506.70, which the Court found to have priority over the mortgage) amounted to a total of $1,051,200.80. The amount paid by State Savings for the property was $913,000.00, leaving a loss to State Savings of the difference between the two which is $138,200.80, of which $28,506.70 is the amount paid to discharge the mechanics' liens.

On September 15, 1966, this action had been commenced, as Civil No. 19985 in the Circuit Court of the First Circuit, State of Hawaii, against Corey, Kimbrough and Young as defendants. The complaint in two counts was in assumpsit on the first count and in fraud on the

second count. About two weeks later the order confirming sale was entered in the mortgage foreclosure proceeding.

State Savings & Loan Association suffered no monetary loss until the property was actually sold at the foreclosure sale and the sale confirmed. On February 7, 1967, after the order confirming the sale had been entered in the mortgage foreclosure proceeding the full loss was taken on the books of State Savings. After the judicial deed had been delivered to State Savings by the commissioner and recorded in the Bureau of Conveyances, State Savings amended its complaint in this action to set forth its exact loss. This action was duly tried before a jury which returned a verdict on both counts in favor of the plaintiff.

On motions, after the verdict on each count was in, the lower court set aside each verdict.

On appeal, the Hawaii Supreme Court reversed the judgment granted by the trial court and reinstated the jury verdict regarding Count I. In reversing the trial court's granting of judgment notwithstanding the verdict as to Count I, the Hawaii Supreme Court said it was erroneous for the Court to subsititute its judgment for the jury's regarding whether it was the $600,000.00 contract or the $761,500.00 contract which had been made a part of the mortgaging agreements. And since it was the $761,500.00 contract which was represented to State Savings as being the true contract between the developer and the contractor, it was correct for the jury to take it into consideration in determining whether Kimbrough, Corey and Young were personally obligated through a written undertaking to discharge the mechanics' liens.

On Count II the trial court was affirmed in denying defendant's motion for judgment notwithstanding the verdict, but the trial court was reversed on its granting

of a new trial as to the damages on Count II. The Court held that only the amount of the proceeds resulting from the foreclosure sale was relevant to the question of damages. The fact that State Savings itself was the buyer, and the fact that it later resold the property were found to be irrelevant.

On the issue or *res ajudicata*, the Court distinguished the present case from *Ellis v. Crockett*, 51 Haw. 45 (1969). The Court specifically held that since plaintiff's damages were not known at the time of the mortgage foreclosure action, the claim in the instant case could not have been litigated then. Indeed, it was not even known if plaintiff had suffered any damage, and that could be determined only after the mortgage was foreclosed and the property sold at a loss to the mortgagee. Even if State Savings had known about the fraud when the mortgage foreclosure action was brought, the other essential element of fraud, that of having suffered damages, was not then present and did not occur until the trial was over and the property sold at a loss at judicial sale.

ARGUMENTS

I

Over the petitioner's objection, the trial court in this action instructed the jury, in part, that in construing the written undertaking executed by Kimbrough, Corey and Young to State Savings, it should consider the loan settlement statement and all testimony adduced with regard to what the parties intended at the time the document was prepared and executed. The jury returned a special verdict on Count I relating to the written undertaking against Kimbrough, Corey and Young for $28,506.70. On Count II for fraud, the jury found for State Savings and against Kimbrough and Corey for $109,694.00. The trial court, on motion by petitioners, set aside the judgment as to Count I and entered a judgment

notwithstanding the verdict, finding that Better Built had been paid by Kauai Development according to the terms of the $600,000.00 contract. The trial court also ordered a new trial on Count II to determine damages only, stating that it had erred in not admitting evidence relating to a sale of the hotel by State Savings after this suit had been instituted.

The Hawaii Supreme Court reinstated the verdict of the jury on all counts and reversed the order for a new trial. That Court, in so doing, stated (53 Haw. 132, 141-2),

> "The jury had the written guarantee agreement, a copy of what was represented to State Savings as a construction contract, and testimony from all parties involved upon which to base its verdict. It has long been the law of this jurisdiction that verdicts based on conflicting evidence will not be set aside where there is substantial evidence to support a jury's findings. *Ashford v. Thos. Cobb & Son, Ltd.*, 52 Haw. 113, 123, 471 P.2d 530, 536 (1970); *Fernandez v. Hao*, 43 Haw. 335, 336 (1959); *Louis v. Victor*, 27 Haw. 262, 263 (1923). There was sufficient evidence for the jury to find for State Savings on Count I. As such, the judgment granted by the trial court should be reversed as to Count I and the jury verdict reinstated."

In so ruling, the Hawaii Supreme Court in no way impaired the Obligation of Contracts in violation of Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States. *Morton v. Dardanelle Special School District*, 121 F.2d 423, cert. den. 314 U.S. 655, 86 L. Ed. 525, 62 S. Ct. 106, reh. den. 314 U.S. 711, 713, 86 L. Ed. 567, 568, 62 S. Ct. 178, 358; *Central Land Company v. Laidley*, 159 U.S. 103, 40 L. Ed. 91, 16 S. Ct. 80.

II

Petitioners make no claim that they have not had an opportunity to be heard fully concerning the adjudication of the claims which were brought below. Indeed, their only invocation of the jurisdiction of the United States Supreme Court is through the claim that the decision of the Hawaii Supreme Court deprives them of property without due process of law simply because the effect of the decision is to deny them their claim to the property.

However, this Court has held repeatedly that the Fourteenth Amendment does not impair the authority of the States, by their judicial tribunals, and according to the established modes of procedure, to determine finally, for the party before them, controverted questions as to the ownership of property. *Tracy v. Ginzberg*, 205 U.S. 170, 51 L.Ed. 755, 27 S. Ct. 461; *Wood v. Conneaut Lake Park, Inc.*, 386 F. 2d 121, cert. den. 391 U.S. 907, 20 L.Ed.2d 422, 88 S.Ct. 1660. All of the parties in interest were before the State Court and petitioner made full use of all available opportunities for hearing.

III

Petitioner contends that Federal questions were first raised only after the Hawaii Supreme Court had rendered its decision when petitioner requested a re-hearing before that Court. In a per curiam decision, that petition for rehearing and motion to amend the opinion by striking was held to be without merit and denied without argument.

There is no indication that the State Court decision involved a Federal question, that the Court actually passed upon and decided any Federal question, that such a decision of a Federal question was necessary to the determination of the cause, or that such a Federal question

was not frivolous or wholly without merit. *McCorquodale v. Texas*, (1908), 211 U.S. 432, 53 L.Ed. 269, 29 S.Ct. 146.

It has long been established that it is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a State, after that court has pronounced its final decision. *Loeber v. Schroeder*, 149 U.S. 580, 37 L.Ed. 856, 13 S.Ct. 934; *Pim v. St. Louis*, 165 U.S. 273, 41 L.Ed. 714, 17 S.Ct. 322.

IV

The portion of the opinion of the Hawaii Supreme Court entitled "VIII Attorney Corey's Conduct" was dictum. Nowhere is it suggested that the decision in the case turned on the fact that Petitioner Corey was an attorney. The Hawaii Supreme Court was merly admonishing a member of the Bar of the State of Hawaii, and exercising that Court's inherent right to support the ethical standards of the Bar. Petitioner Corey had not been disbarred, suspended, or otherwise prevented from practicing law. Should a charge be made under Rule 16 of the Supreme Court of Hawaii, or should he desire to clairfy the admonition and have his conduct investigated, he then will have ample opportunity to be heard. If there is any formal disciplinary proceeding at a later time, he then will be entitled to a hearing with all the protections of the Fourteenth Amendment.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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